1942 File No. O. Village Panch/42

Legal DEPARTMENT

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Subject:—

Opinions under the

Bombay Village Panchayats Act, 1933.

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B.H.S. 26/4

D.L. 27-4-56 Seen 27/4/56

Office of the R.L.A.

By its resolution No.21, dated the 27th May 1940 the District Local Board, Surat, decided to transfer to the Village Panchayat, Khergam, its Dharamshala building (with the compound and wall) and to pay Rs.100 for its repairs subject to the following conditions, namely:-

(1) That the Panchayat should, according to its financial condition, keep the said Dharamshala in proper order; and

(2) That the local board reserves to itself the right to have the Dharamshala re-transferred to itself on giving a reasonable notice and that the Panchayat shall have no right to raise any objection.

In his letter No.180, dated the 8th January 1942, the Collector of Surat reports that the President, District Local Board, Surat, states that the Dharamshala building at Khergam was transferred to the Village Panchayat, Khergam, under section 30 of the Bombay Village Panchayats Act, 1933.

2. The question for the Remembrancer of Legal Affairs' consideration is whether the transfer of the Dharamshala building by the District Local Board, Surat, to the Village Panchayat, Khergam, without the previous sanction of the Commissioner under the proviso to section 47 of the Bombay Local Boards Act, 1923, is legally in order.

3. Section 30 of the Bombay Village Panchayats Act,1933, deals with the property of panchayats and sub-section (1) of that section merely provides that it shall be competent to a local board from time to time direct that any property vesting in such local board shall vest in the panchayat. This section does not, however, in any way enlarge the scope of the powers of local boards as provided in section 47 of the Bombay Local Boards Act, 1923, nor does it remove the restrictions imposed by the proviso to the said section 47. Construing section 30 of the Bombay Village Panchayats Act,

1933, and section 47 of the Bombay Local Boards Act,1923, together. It appears that in cases in which the proviso to section 47 is applicable, the previous sanction of the Commissioner as required by that proviso will be necessary even in the case of transfers to panchayats in consonance with section 30 of the Bombay Village Panchayats Act. Condition (ii) at p.1 refers to retransfer and thus shows that in this case the District Local Board, Surat, has transferred its Dharamshala building at Khergam to the Village Panchayat. Since the transfer is for an indefinite period and not in the nature of a lease for a term not exceeding 7 years, previous sanction of the Commissioner under the proviso to section 47 of the Bombay Local Boards Act,1923, should have been obtained. In the absence of express provision or circumstances justifying necessary implication, it would not be permissible to construe that section 30(1) of the Bombay Village Panchayats Act, 1933, overrides or dispenses with the restrictions imposed by the proviso to section 47 of the Bombay Local Boards Act, 1923. It would not therefore be correct to say that the transfer in question was made only under section 30(1) of the Bombay Village Panchayats Act and not under section 47 of the Bombay Local Boards Act as both these provisions are equally applicable to the transfer now under consideration and there is no necessary conflict in applying them both.

Sd/---- 20/2
Remembrancer of Legal Affairs.

U.R. to G.D.,No. 1626 dated the 21st February 1942.

B.K.S. 25/4.

Office of the R.L.A.

The question for the consideration of the R.L.A. is whether inferior village servants useful to Government are servants of the Crown within the meaning of section 8(j) of the Bombay Village Panchayats Act, 1933.

2. Section 8(j) of the Bombay Village Panchayats Act, 1933, provides that no person may be a member of a Panchayat or continue as such, who is a servant of the Crown or a servant of any local authority. The expression "servant of the Crown" is not defined in the Act, but seems to have been used with reference to section 241 of the Government of India Act,1935 which relates to Crown servants i.e. persons serving His Majesty in the affairs of the Federation or the Provinces. Even in the Government of India Act,1935, the expression "Crown servant" or "person serving His Majesty" has not been defined. In his opinion, No.29, dated 3rd January 1939 the R.L.A. opined: "In the absence of any authoritative definition of the expression "Crown servant" or "person serving His Majesty" the test followed by the Parliament in making adaptations to Indian Acts is that no officer can be said to be the servant of the Crown unless he is either appointed by Government or paid out of Government revenues". In Marathe v. Pandurang (1938 I.L.R. Bom. 770) a question arose whether a servant in the Bombay Subordinate Medical Service was a "servant of the Crown" within the meaning of section 270 of the Government of India Act and the Bombay High Court held: "Though there is no definition of the expression "servant of the Crown" in the Government of India Act,1935, the expression as occurring in section 270 of the Act, has, unless there is something in the provisions of the Act which suggests a different meaning, the same meaning which is given in the definition of the expression "servant of

the Queen" in sections 13. 14 and 17 of the Indian Penal Code as including all officers and servants continued, appointed or employed in India by or under the authority of the Government of India or any Government". The expression "a person serving His Majesty" used in section 241 seems to be synonymous with "a servant of the Crown" used in section 270. Consequently the main point for consideration is whether the inferior village servants useful to Government are appointed or employed by the Government of Bombay.

3. The provisions contained in Part X of the Bombay Hereditary Offices Act.1874. relate to the inferior village hereditary offices. Sub-section (4) of section 64 in Part X provides for powers of the Mamlatdar and the Mahalkari to pass orders in regard to the appointment, remuneration, period or service, suspension and fining of persons officiating, the grant of leave of absence and other matters of discipline not expressly provided for by this or any other law for the time being in force. Under section 7 of the Bombay Village Police Act the Police Patil has authority over all village servants and under section 9 they shall be liable to penalties for neglect of duty. By Government Notification (Finance Department) No.1527/33-B, dated the 1st April 1937 the power to appoint Government servants which had vested in authorities other than the Provincial Government before 1st April 1937 has been continued. Consequently the powers to appoint inferior village servants vested in the Mamlatdar and Mahalkari under section 64(4) of the Hereditary Offices Act,1874, before the Government of India Act, 1935 have, by virtue of the aforesaid Government notification, continued. That being so, it appears that the inferior village servants being appointed under the authority of Government are, apart from the question whether or nor they are paid out of Government revenues, although usually the

cash payments, if any, would also be made out of the provincial revenues, servants of the Crown within the meaning of section 3(j) of the Bombay Village Panchayats Act (cf. para 2 of R.L.A.'s opinion No.3128, dated 6th April 1939). In the present case Pandharinath Krishna Nanabar is an inferior village servant useful to Government and is paid Rs. 2 as Mushahira out of Government revenues. Consequently it appears that he is a servant of the Crown within the meaning of section 3(j) of the Bombay Village Panchayats Act. But the point is not quite free from doubt.

4. In the course of the second reading of the Bombay Village Panchayat Amendment Bill XVI of 1938 by which clause (j) was inserted in section 3 of the Bombay Village Panchayats Act the Hon. Minister in charge stated: "The legal position in this respect has been examined and only the Police Patil and other servants will be excluded from contesting elections. Inferior village servants such as balutedars and others are not included in the term "Crown servants". (See page 617 of the Bombay Assembly Debates, Vol. V. Pt. I, 1939). No opinion of the R.L.A. on the point is traceable. It has been held by the R.L.A. in his opinion No.3128, dated the 6th April 1938 that a revenue Patil is a servant of the Crown in the same way as a Police Patil. The statement made by the Hon. Minister does not appear to be quite correct in so far as it is construable with reference to inferior village servants doing duties for Government as distinguished from pure balutedars who may or may not work for the villagers from whom they receive their balutas. Since however Government had given expression to a definite opinion in the Assembly in the course of the debate on the Bill, it does not appear desirable that it should now recile from that opinion and hold that inferior village servants are servants of the Crown under section 3(j) more especially

as it was on account of the view expressed in the Assembly that the amendment to delete the particular clause was withdrawn. It should therefore be left to the party contesting the election of such inferior village servant to test the validity thereof in a Court of law and until there is an authoritative decision on the point Government may continue to hold that inferior village servants are not servants of the Crown. In the alternative, in order to dispel all doubts on the point the Bombay Village Panchayats Act may be suitably amended so as to permit inferior village servants to be members of the Panchayat. This however is a matter of policy to be decided by the administrative Department.

Sd/——— 1/4.
Remembrancer of Legal Affairs.

U.R. to G.D. No. 2882 dated the 2nd April 1942.

B.K.S. 26/4.

Office of the R.L.A.

It appears that an elected member of the Village Panchayat of Adas, Taluka Anand tendered his resignation. Steps were taken to hold a by-election to fill up the vacancy caused by his resignation. No person stood as a candidate at the by-election. The by-election having failed, the —— District Local Board, Kaira, was asked by the Collector of Kaira to fill up the vacancy by appointing a suitable and qualified person under the provisions of section 8(3) of the Bombay Village Panchayats Act, 1933. The District Local Board thereupon appointed the very person who had originally resigned and whose vacancy was to be filled. The question referred to the R.L.A. for consideration is whether such appointment would be legal in view of the provisions of section 23(1) of the Bombay Village Panchayats Act.

2. Section 23 of the Bombay Village Panchayats Act, 1933, provides inter alia that any vacancy of a member due to resignation shall be filled by the election of a member who shall hold office so long only as the member in whose place he has been elected would have held the office if the vacancy had not occurred. Section 24 lays down that during any vacancy in the Panchayat the continuing members may act as if no vacancy had occured. It seems to me that there is no provision in the Village Panchayats Act to meet the difficulty which has arisen in this case by reason of no one coming forward to stand for the by-election, and it is very doubtful if in the circumstances the Collector was justified in directing the District Local Board to appoint a person under the provisions of section 8(3). This section is apparently intended to cover the first election to a newly constituted panchayat and possibly also the general election every

three years; but it has no application to a by-election. If a by-election does not result in the filling up of a casual vacancy, then it would appear that the remaining members of the Panchayat can continue to act as if no — vacancy had occured. As the Act does not empower the District Local Board to fill up a casual vacancy by appointment, the appointment of the resigning member by the Board in the present case would appear to be ultra vires. Since, however, the — appointmenthas actually been made. Government may allow it to stand until its legality is challenged in a Court of law.

Sd/———— S/S
Remembrancer of Legal Affairs.

U.R. to G.D., No. 3924, dated 11th May 1942.

B.K.9 28/4.

Office of the R.L.A.

The question for the R.L.A's consideration is whether it is permissible for a village panchayat to levy a "bazar tax" or "tax on markets under clause (vii) of sub-section (3) of section 89 of the Bombay Village Panchayats Act,1933.

2. Under section 89(3) of the Bombay Village panchayats Act, 1933, it is competent to a panchayat to levy all or any of the taxes or fees prescribed in clauses (i) to (vii) at such rates and in such manner as may be prescribed. "Prescribed" means prescribed by rules (vide section 3(8)). Under clause (vii) a panchayat is competent to levy any tax other than those specified in clauses (i) to (vi) (not being a toll on motor vehicles or trailers, save as provided by section 14 of the Bombay Motor Vehicles Tax Act, 1935) which a Provincial Legislature has under the Government of India Act, 1935, power to impose in the Province and which has been approved by the District Local Board and sanctioned by the Provincial Government. Section 99(1) of the Government of India Act, 1935, provides that subject to the provisions of the Act, a Provincial Legislature may make laws for the Province or for any part thereof. Sub-section (3) of section 100 provides that subject to the two preceding sub-sections, the Provincial Legislature / has and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (called the Provincial Legislative List). "Markets and fairs" will come within entry No.27 in the Provincial Legislative List. Consequently under section 100(3) of the Government of India Act, 1935, read with entry 27 of List II, the Provincial Legislature has power to make laws with respect to "markets and fairs".

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The Provincial Legislature has also power to make laws providing for levy of fees in respect of markets and fairs (see section 100(3) of the Government of India Act, 1935 read with entries Nos. 27 and 54 of Legislative List II of Schedule VII). Consequently it would be competent for Government to make rules under section 108(1)(m) of the Bombay Village Panchayats Act, 1933 prescribing the rates of fees in respect of fairs and markets under section 59(3)(vii).

Sd/——— 21/5
Remembrancer of Legal Affairs.

U.R. to G.D., No. 4233 , dated the 22nd May 1942.

D.L.S. 23/4.

Office of the R.L.A.

The Commissioner, Northern Division, is of the opinion that under the Rules framed under section 108(1)(p) of the Bombay Village Panchayats Act, 1933, a village panchayat cannot be given a loan for its ordinary current expenditure. This opinion is based on the view that the word "work" in rule 2 must be interpreted as meaning a work of construction or repair. The R.L.A. is requested to give his opinion on these two points.

2. The Commissioner's view that work in rule 2 must mean a work of construction or repair appears to be correct. But that seems to form an insufficient basis for the view that therefore a village panchayat cannot be given a loan for ordinary expenditure. Section 93 of the Bombay Village Panchayats Act, 1933, provides inter alia that notwithstanding anything contained in the Bombay Local Boards Act, 1923, the District Local Board may, subject to Rules, grant a loan to panchayats within the district, for the purposes of this Act. Section 108(1)(p) gives power to the Provincial Government to make Rules under section 93 prescribing the terms on which loans may be granted to a panchayat by the District Local Board. In exercise of this power, the Provincial Government has framed five rules :-

Rule 1 ~~xx~~ provides that no application made by a panchayat for a loan shall be entertained by a district local board unless such application is supported by a resolution passed by a two-thirds majority of the whole number of members of the panchayat.

Rule 2 lays down that a district local board may, on an application made by a panchayat in accordance with rule 1, grant to the panchayat a loan not exceeding the sanctioned estimate of the work on which the amount is required to be spent by the panchayat, on the security of the funds

for some purposes of the Act. It would therefore seem that a Local Board can grant a loan to a Village Panchayat for its ordinary current expenditure.

It may be noted that Rules 1, 3, 4 and 5 are in general terms and do not even suggest that loans are to be only for works. That would tend to show that Rule 3 was not intended to restrict loans, but was meant merely to prescribe the maximum for a particular kind of loan. But as it stands, the rule might seem to some to imply restriction. The local officers have apparently interpreted it in that way. It would therefore seem advisable to amend the rule. If it be the intention of Government that loans under section 93 should be restricted to loans for work that section should be amended.

Sd/----- 22/6
Remembrancer of Legal Affairs.

U.R. to G. D. No. 5137, dated the 23rd June 1942.

B.K.S. 26/4.

Office of the R.L.A.

THE STATEMENT OF THE CASE FOR THE OPINION OF THE ADVOCATE GENERAL.

This reference arises from a ruling which the R.L.A. gave last year on the interpretation of section 4 of the Bombay Village Panchayats Act. 1933.

2. The District Local Board, Bijapur, had passed a resolution expressing the view that it was undesirable and dangerous to establish village panchayats in villages where the majority of villagers were unwilling to have a panchayat, and recommending that the Bombay Village Panchayats Act be suitably amended making the establishment of village panchayats voluntary and not obligatory. In commenting upon this resolution the Commissioner, S.D. opined that the provisions of sub-section (1) and sub-section (2)(b) of section 4 of the Bombay Village Panchayats Act were difficult to reconcile and that it would be futile for all practical purposes to declare that a village with a population of not less than 2,000 should cease to be a village if at the next moment it would be incumbent upon Government to renotify it again as a village. Thereupon the following questions were raised for the consideration of the R.L.A. :-

(1) Whether the provisions of sub-sections (1) and (2) of section 4 of the Bombay Village Panchayats Act, 1933 cannot be ~~ø~~ reconciled; and

(2) Whether it is obligatory on Government to declare a revenue village with a population of not less than 2,000 to be a "village". even though Government declared under section 4(2)(b) that such local area had ceased to be a "village"

3. In his opinion No.5353 dated 16th June 1941, the R.L.A. held as follows:-

"Sub-section (1) of section 4 of the Bombay Village Panchayats Act, 1933, provides that whenever the Provincial Government, after making such inquiry as may be prescribed is satisfied that any local area comprising a village or a group of villages has a population of not less than 2,000 it shall, by notification in the Official Gazette, declare such local area to be a village. The proviso to this sub-section gives discretion to Government to direct that any local area having a population of less than 2,000 be declared a village. Sub-section (2) empowers the Provincial Government, after consultation with the District Local Board, to declare that any local area shall cease to be a village All these provisions must be read together, and construe harmoniously. Sub-section (2) cannot therefore be held to override the mandatory provisions of sub-section (1); the powers of Government under sub-section (2) can only be interpreted as intended to be exercised in certain circumscribed limits, for instance, where the population of a local area declared a 'village' under sub-section (1) drops below 2,000 or where the whole local area is incorporated into another 'village', or where the local area concerned was declared a 'village' under the proviso to sub-section (1). When action is taken, in such cases, under sub-section (2) no question arises of Government having to renotify the local area as a village under sub-section (1)."

4. In a more recent case before Government where the question was whether Patdi which had been declared a village should be notified as having ceased to be a village,

the A(R) in his note dated 1st July 1942 has taken the view that the words "any local area" in section 4(2)(b) appear to give Government the power of exemption in any unsuitable case and consequently under section 4(2)(b) as it stands Government has general power to declare any local area to cease to be a village, whether such village has a population of more than 2,000 or less than 2,000. It is further argued that had the intention been otherwise, words would have been added to make it clear that the power could only be exercised if the population fell below 2,000 or the whole local area were incorporated into another village. This contention would have considerable force if sub-section (2)(b) could be read independently of sub-section (1) of section 4. But as pointed out in the R.L.A's opinion cited ✓ above, sub-sections (1) and (2) of section 4 must be read together and construed harmoniously, and when so read it cannot be held that sub-section (2) overrides the mandatory provisions of sub-section (1).

5. As however the question is of general importance, the Advocate General is requested to be so good as to state whether he agrees with the view expressed in R.L.A's opinion No.5353 dated 16th June 1941.

Sd/----

Remembrancer of Legal Affairs.

U.R. to the Adv. General, No.5889, dated 7th July 1942.

B.K.S.26/4

I agree with the view expressed by the P.L.O. in his Opinion dated the 16th of June 1941.

2. It is a well settled rule of construction that different parts of a statute should be read together and that if one part appears to be in conflict with another part, the construction to be adopted should be such as to reconcile and harmonise the two parts which appear to conflict.

3. This rule of construction has greater force when the parts which appear to conflict are not distinct sections but different provisions of the same section.

4. Giving effect to this rule of construction, it is clear that sub clause (2)(b) of section 4 of the Act is to be construed so as not to affect the obligation laid on the Provincial Government by sub clause ~~(1)(b)xxxx

it is clear that sub clause (2)(b) cannot be read so as to override the mandatory provisions of sub clause (1).

Sd/----------

Advocate General.

17-7-42.

B.K.S. 26/4.

Office of the R.L.A.

"If a duty is thrown directly upon the Crown by statute, there is no way of enforcing the performance of that duty if it is left unperformed by the Crown. No proceedings can be taken either against the Crown itself or against any servant of the Crown to compel the performance of the statutory duty devolving on the Crown. The immunity excludes any remedy by mandamus" (Craies on Statute Law, p.378).

Section 4(1) read with section 5 of the Bombay Village Panchayats Act, 1933, casts a duty on Government to establish a panchayat in every village which has a population of not less than 2000. There is no way of enforcing the performance of that duty if it is left unperformed by the Crown. Consequently, no action can lie against Government for failure to establish panchayats in villages having a population of not less than 2000.

Sd/---------- S/9
Remembrancer of Legal Affairs.

U.R. to G.D., No.7276 dated the 9th September 1942.

27/4/56
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27-4-56

B.K.S. 26/4.